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From Fragmentation to Coherence

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A call for a WTO ministerial decision on trade and human rights

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KEY MESSAGES

- International trade law and human rights share a common origin as mutually supportive bodies of law to protect individual freedom. Yet, to a large extent they developed in isolation from each other. As a result, the two regimes are now part of the fragmented landscape of international law. On the one hand, human rights protect individual rights that are essential for international trade, such as rights to freely pursue economic activities or freedom of expression. On the other hand, trade rules may jeopardise the realisation of human rights, especially social rights.
- In order to avoid negative impacts of this fragmentation, mechanisms for solving conflicts between the two regimes are necessary. We argue that such mechanisms require neither a rigid concept of hierarchy of norms nor new substantive obligations to be imposed on states. Instead, we call for appropriate procedures and coordination. This general procedural approach is illustrated for specific human rights and their relation to international trade law.

A. Introduction

At first glance, human rights¹ and trade regimes do not have much in common. Human rights' primary focus on ensuring human dignity for each individual is absent from trade's commitment to ensuring that nations can flourish economically. Separate in their legal development in the

* Individual Project No. 4, 'Human Rights and Trade'.

¹ The term 'human rights' in this document refers to existing human rights norms as enshrined in core international human rights treaties.

twentieth century,² human rights and trade regimes are, however, as off-spring of an international post-world war order, both instruments of the same overall global interest, which is to promote peace and human welfare. As different sides of the same coin, they are mutually complementary. The objective of the World Trade Organization (WTO) of increasing human welfare with an open trading system that fosters employment and development at the same time requires and promotes individual freedom and human rights.³ Human rights serve trade interests because they enhance economic potential (e.g. human resources and education) and protect economic freedoms. Defining procedures and parameters to strike a careful balance when, in a fragmented international order, systemic overlaps occur, is thus crucial to assure the effectiveness of both regimes. In addition, the sustainable development provision as anchored in the preamble of the WTO Marrakesh Agreement requires balancing WTO economic objectives against social and environmental concerns.⁴ As human rights standards form part of the social factor of the concept⁵ the task of efficiently coordinating human rights and WTO law is implicitly expressed in the sustainability objective to which WTO Members have committed.

However, after almost fifteen years of existence of the WTO, this mandate has still not been fulfilled. WTO bodies have not reacted to the human rights approach to trade proposed by the UN High Commissioner for Human Rights. The Doha Agenda does not refer to human rights.⁶ New initiatives for coordinating international trade law and human rights seem unlikely in the near future.⁷ Hence, WTO policy is not only committed to coordinate both systems, but is also under

2 T. Cottier, 'Trade and human rights, a relationship to discover' (2002) 5 *Journal of International Economic Law* 111.

3 T. Cottier, 'Legitimacy of the WTO law' (2008) NCCR Working Paper 2008/19, 6; S. A. Aaronson, 'Seeping in slowly: How human rights concerns are penetrating the WTO' (2007) 6 *World Trade Review* 413.

4 Appellate Body Report, *US – Shrimp*, para. 129, at footnote 107; International Law Association, Report of the 70th Conference, New Delhi, Committee on Legal Aspects of Sustainable Development (Cambrian Printers, 2002), pp. 385–398.

5 K. Gehne, 'Nachhaltige Entwicklung als Rechtsprinzip: normativer Aussagegehalt, rechtstheoretische Einordnung, Funktionen im Recht', PhD thesis, University of Zürich (2008).

6 R. Howse and R. G. Teitel, 'Beyond the divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization' (2007) 30 *Dialogue on Globalization*, available at: <http://library.fes.de/pdf-files/iez/global/04572.pdf> (visited 14 April 2009), p. 5.

7 International Law Association, 'Report of the 73rd Conference', Rio de Janeiro, (2008), Committee on International Trade Law, para. 39.

pressure to react. No legal system will operate effectively if the solution of potential conflicts of norms is left to legal uncertainty and the related legitimacy concerns are being ignored. Neither the human rights nor the trade regime can function effectively if they are not promoted in such a way as to mutually assure their objectives. If the WTO remains silent on overlapping trade and human rights issues, it loses credibility which may jeopardise its status as a key actor in international governance.⁸ Legal instruments to coordinate both regimes, as proposed in this chapter, could contribute significantly to a more coherent and predictable legal structure, improve international decision making and sustain the Organization's legitimacy. The goal is not to establish a hierarchy of one regime over the other based on ideological concepts or to freeze legal options into a fixed system of rules. Rather, we aim at an ongoing process of creating flexible legal and institutional mechanisms which allow the careful balancing and coherent development of both systems on a case-by-case basis. The systemic necessity for coherently interpreting trade and human rights rules has already been acknowledged by the International Law Association Trade Law Committee in its 2008 Report which submitted a Draft ILA Declaration on International Trade Law and Human Rights.⁹ This chapter will go beyond this approach by suggesting a general framework as well as recommendations for specific human rights.

In the following we are advocating a Multilateral Agreement on Trade and Human Rights to be annexed to the WTO Marrakesh Agreement. With a view to creating such a commitment and launching the necessary political process, we propose a WTO Ministerial Decision to prepare the agreement. In this vein, we first present an annotated Draft Decision on Trade and Human Rights (B). Second, based on our research, we set out elements of a Multilateral Agreement on Trade and Human Rights (C). Third, we elaborate on regulatory initiatives in specific areas which could be considered as annexes to the Multilateral Trade and Human Rights Agreement or other WTO agreements (D).

8 E.-U. Petersmann, 'The "Human Rights Approach" advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is it relevant for WTO law and policy?' (2004) 7 *Journal of International Economic Law* 611; J. Pauwelyn, 'The Sutherland Report: A missed opportunity for genuine debate on trade, globalization and reforming the WTO' (2005) 8 *Journal of International Economic Law* 331.

9 International Law Association, Report of the 73rd Conference, Rio de Janeiro (2008), Committee on International Trade Law, available at www.ila-hq.org/en/committees/index.cfm/cid/24 (visited 14 April 2009), para. 35.

B. Creating the commitment: a decision on trade and human rights as a starting point and normative guideline

The following draft Decision on Trade and Human Rights together with short comments transmits some of our key research findings and their potential policy implications. It is intended as a commitment for coordinating trade law and human rights by the Ministerial Conference which can take decisions on all matters under any of the multilateral trade agreements.¹⁰

BOX 8.1 DRAFT DECISION ON TRADE AND HUMAN RIGHTS

DECISION ON TRADE AND HUMAN RIGHTS

Ministers,

- Recognising that human rights concerns are inextricably linked to free trade;
- Reaffirming our commitment to respect, protect and promote the dignity of all humans;
- Acknowledging our legal obligations under international human rights law;
- Convinced that trade liberalisation can foster the practical advancement of human rights;
- Concerned that international trade's impact on some individuals has lessened rather than increased their enjoyment of basic human rights and that trade rules may form a hindrance to the progressive development of human rights law;
- Aware that private actors can significantly affect dignified conditions for work and life and reaffirming the duty of the State to protect all human rights from abuses by, or involving, business enterprises;
- Accepting the United Nation's human rights approach to trade, that 'seeks to devise trade law and policy to take into account the rights of all individuals, in particular vulnerable individuals and groups' and 'requires a constant examination of the impact of trade liberalisation on the enjoyment of human rights';
- Noticing the Singapore Declaration's 'commitment to the observation of internationally recognised core labour standards' as well as the statement in the Declaration on Social Justice for a Fair Globalization of the International Labour Organization that the 'violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage';

¹⁰ We deliberately opt for the political and not the judicial body to decide on trade and human rights issues. This is not only in line with the general character of the WTO as a member-driven organisation but also ensures participation and public discussion of this controversial field of law. See, e.g., M. A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York, The Free Press, 1993), pp. 171, 182.

- Noting that carefully drafted trade incentive regimes may advance the cause of human rights

Decide,

- that the World Trade Organization shall fully respect the international law of human rights and support their full enjoyment;
- that the protection of human dignity shall be a guiding principle of the Organization;
- that a Multilateral Agreement on Trade and Human Rights is to be negotiated, providing appropriate instruments to foster mutually supportive regimes and institutional and legal coherence to promote the full effectiveness of both regimes.

I. . . . Recognising that human rights concerns are inextricably linked to free trade and convinced that trade liberalisation can foster the advancement of human rights

As mentioned above, human rights and international trade law are inter-dependent legal regimes. Trade policy and rules can positively influence employment, competitive advantage, and living conditions, but can also – if competition is detrimental or production toxic – destroy income sources and livelihoods and thus compromise human rights, such as the rights to food, to health, to work or to be free from discrimination.¹¹ Likewise, free markets depend on human rights; such as access to information, free movement, economic freedom, and judicial rights. As a result, a free trade regime can foster human rights at the same time as human rights are fostering trade.¹² This is conceptually expressed in a constitutionalist approach to the WTO, according to which human rights form part of a constitutional horizontal layer of law which serves as a guiding principle for law creation and law application.¹³

11 See, e.g. 'Globalization and its impact on the full enjoyment of human rights', Report of the High Commissioner for Human Rights submitted in accordance with the Commission on Human Rights Resolution 2001/32. UN Doc. E/CN.4/2002/54 (15 January 2002).

12 E.-U. Petersmann, 'The "Human Rights Approach" advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is it relevant for WTO Law and Policy?' (2004) 7 *Journal of International Economic Law* 613; International Law Association, 'Report of 73rd Conference', Rio de Janeiro (2008), Committee on International Trade Law, para. 42.; R. Howse and R. G. Teitel, 'Beyond the divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization' (2007) 30 *Dialogue on Globalization*, available at: <http://library.fes.de/pdf-files/iez/global/04572.pdf> (visited 14 April 2009).

13 See the contribution of the Individual Project No. 1 to this book, 'Constitutionalism and Multilayered Governance'.

II. . . . *Reaffirming our commitment to respect, protect and promote the dignity of all humans*

The concept of human dignity constitutes the root of all human rights. Since human rights also form part of the sustainability objective of the WTO,¹⁴ human dignity belongs to the 'basic principles' and 'objectives underlying this multilateral trading system', which WTO Members are committed to 'preserve' and 'foster'.¹⁵ In order to raise the awareness of Members and WTO arbitrators this Declaration emphasises and reaffirms human dignity as a key conceptual element in coordinating the human rights and trade regime.

III. . . . *Acknowledging our legal obligations under international human rights law*

Besides their trade treaty obligations, WTO Members are bound by human rights law. All 192 UN Member States have human rights obligations under the UN Charter.¹⁶ Each WTO Member has ratified at least one of the eight core international human rights treaties.¹⁷ In addition, parts of the Universal Declaration of Human Rights (UDHR) have become customary international law.¹⁸ States cannot refrain from meeting their human rights obligations by adhering to other legal regimes with lower standards of human rights protection.¹⁹

IV. . . . *Concerned that international trade's impact on some individuals has lessened rather than increased their enjoyment of basic human rights and that trade rules may form a hindrance to the full enjoyment of human rights and progressive development of human rights law*

Studies on the WTO Agreement on Agriculture, the General Agreement on Trade in Services, on trade and investment, and the

14 See above, Introduction.

15 Preamble of the WTO Marrakesh Agreement, para. 5.

16 See Articles 55 and 56 of the UN Charter.

17 See for the core agreements: www2.ohchr.org/english/law/index.htm#core (visited 8 December 2008), for ratification statistics www2.ohchr.org/english/bodies/ratification/ (visited 14 April 2009).

18 See P. Alston, 'Ships passing in the night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals' (2007) 27 *Human Rights Quarterly* 754–828.

19 See European Court of Human Rights, *Matthews v. the United Kingdom*, case No. 24833/94, § 28, ECHR 1999-I.

principle of non-discrimination show that international trade has the potential for compromising human rights.²⁰ Such potential negative impacts became apparent and were confirmed during our project through doctoral research exploring the impact of international trade law on the right to food and public services:

1. Example: The right to food

Several studies which have examined the impact of trade liberalisation on the right to food found violations of this right²¹ by a government vis-à-vis its people. Such violations occur, for example, through not stabilising farm gate prices at an adequate level, not sufficiently targeting support to poor farmers and not reacting to dumping.²² The studies assessed the impact of trade liberalisation on the right to food by combining macro-level analysis of domestic food production, foreign importation and related state policies with micro-analysis at the community level. The main challenge of such studies is the verification of causalities between trade policies and the violation of the right to food. The effects of natural disasters, civil wars, changes in land tenure arrangements, deterioration in access to infrastructure, farm input, credits or extension services are additional factors that need to be carefully assessed.²³

The 2008 food crisis illustrates that international trade significantly influences the food situation. A panel organised with scholars from the NCCR Trade Regulation research group on agriculture (IP5) found that from a food security perspective, export restrictions and regulation of biofuels need to be addressed in the Doha Round.²⁴

20 C. Breining-Kaufmann, 'The legal matrix of human rights and trade law: State obligations versus private rights and obligations', in T. Cottier, J. Pauwelyn and E. Bürgi (eds.), *Human Rights and International Trade* (Oxford University Press, 2005), p. 118; C. Dommen, 'Human rights and trade: Two practical suggestions for promoting coordination and coherence', in T. Cottier, J. Pauwelyn and E. Bürgi (eds.), *Human Rights and International Trade* (Oxford University Press 2005), p. 200.

21 The right to food is enshrined in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights. For an overview of the different state obligations to respect, protect and fulfil the right to food, see C. Kaufmann and S. Heri, 'Liberalizing trade in agriculture and food security: Mission impossible?' (2008) 40 *Vanderbilt Journal of Transnational Law* 1039-1070, 1051-55.

22 For an example see A. Paasch, F. Garbers and T. Hirsch, *Trade Policies and Hunger: The Impact of Trade Liberalisation on the Right to Food of Rice Farming Communities in Ghana, Honduras and Indonesia* (Geneva, Ecumenical Advocacy Alliance, 2007).

23 *Ibid.*, p. 113.

24 World Trade Organization, 2008 Public Forum Proceedings (25-26 September), Session 16: 'World Food Crisis: Are trade rules a problem or a way forward?' Organised by NCCR Trade Regulation, World Trade Institute and the International Centre for Trade and

During the Uruguay Round, negotiators were already concerned that agricultural reform could have negative effects on least developed and net food-importing developing countries, since several analyses had shown that the reform process was likely to increase food import bills as world prices of basic foodstuffs were expected to increase.²⁵ The response was the Marrakesh Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Countries.²⁶ The Marrakesh Decision included four response mechanisms:

1. food aid;
2. short-term financing of normal levels of commercial imports;
3. favourable terms for agricultural export credits; and
4. technical and financial assistance to improve agricultural productivity and infrastructure.²⁷

Although it was an integral part of the negotiations on agricultural trade liberalisation in the Uruguay Round,²⁸ and despite its incorporation in Article 16 of the Agreement on Agriculture, the Marrakesh Decision has not been satisfactorily implemented. Since the main obligation to respect, protect and fulfil the right to adequate food to the maximum of available resources remains with the national governments, further efforts to implement and update the Marrakesh Decision to buffer negative and promote positive impacts are needed.

2. Example: Public services

Public services are of crucial importance to human life as they meet key needs such as health, education and water.²⁹ Their provision is often a

Sustainable Development. Report written by S. Heri and C. Häberli (Geneva: WTO Publications, forthcoming); C. Kaufmann and M. Grosz, 'Poverty, hunger and international trade: What's law got to do with it? Current mechanisms and the Doha Development Agenda' (2008) 51 *German Yearbook of International Law* 79–109.

25 Food and Agriculture Organization of the United Nations, *The Right to Food Guidelines: Information Papers and Case Studies* (FAO, 2005), pp. 66–67.

26 World Trade Organization, Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Decisions adopted by the Trade Negotiations Committee, 1867 UNTS 60 (1994).

27 *Ibid.*, para. 3–5.

28 R. Howse and R. G. Teitel, 'Beyond the Divide. The Covenant on Economic, Social and Cultural Rights and the World Trade Organization' (2007) 30 *Dialogue on Globalization*, 26.

29 Report of the High Commissioner, UN Commission on Human Rights, Liberalization of Trade in Services and Human Rights, E/CN.4/Sub.2/2002/9, 13 (25 June 2002).

precondition for the realisation of human rights.³⁰ Public services are needed both economically and socially to propel growth and development.³¹ From a human dignity perspective, they need to be provided on an equitable basis and regardless of an individual's ability to pay for them.³² Thus, problems with the provision of public services can have particularly detrimental effects on human rights. In the context of agreements facilitating investment, such as GATS, liberalisation of these services may increase in the future.³³ Experience shows that in some instances, liberalisation has led to improved quality or gains in efficiency. In other cases, however, the privatisation of water services has had a negative impact on the quality or quantity of the water provided, on the cost of water services, and on access to water. As a result, the three core entitlements of the human right to water have been infringed.³⁴ Similar effects have been reported for the right to education³⁵ and the right to health.³⁶

Problems resulting from liberalising essential services have also led to detrimental effects having a disproportionate impact on women's human rights. Due in part to the gendered nature of the economy or to the division of labour in many countries, correcting the deficiencies in the provision of essential services can become 'women's work'.³⁷ Compromises in the provision of water services can force women to become responsible for the

30 Human rights with regard to public services are, e.g., expressed through the right to water, the right to education, or to health, enshrined in Articles 11, 12, 13 and 14 of the Covenant on Economic, Social and Cultural Rights, see www2.ohchr.org/english/bodies/cescr/comments.htm.

31 UNCTAD Secretariat, Universal Access to Services, Note by the UNCTAD Secretariat, TD/B/COM.1/EM.30/2, 18 September 2006, para. 5.

32 *Ibid.*

33 See, e.g., M. Mashayekhi, M. Julsain and E. Tuerk, 'Strategic considerations for developing countries: The case of GATS and health services', in C. Blouin, N. Drager and R. Smith, (eds.) *International Trade in Health Services and the GATS* (World Bank, 2005), p. 21.

34 General Comment No. 15, The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11 (26 November 2002), para. 12.

35 United Nations, Economic and Social Council, The Right to Education (Art. 13), General comment No. 13, E/C.12/1999/10 (8 December 1999), para. 6.

36 See generally United Nations Committee on Economic, Social and Cultural Rights, The Right to the Highest Attainable Standard of Health, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14 (2000), E/C.12/2000/4 (11/08/2000).

37 United Nations, 'World survey on the role of women in development: Globalization, gender and work' (1999), 56–62; D. Joshi, 'Misunderstanding gender in water', in A. Coles and T. Wallace (eds.), *Gender, Water and Development* (Oxford, Berg Publishers, 2005), p. 138.

gathering and collection of water from other sources.³⁸ This, apart from affecting their health, has caused a loss of women's economic opportunities and their ability to pursue education. Additionally, they may suffer from problems with hygiene, due to deficiencies in services, or become victims of sexual assault or harassment, e.g. on their way to and from the places where they collect water.³⁹

V. . . . *Aware that private actors can significantly affect the conditions necessary for fulfilling human dignity and reaffirming the duty of the State to protect all human rights from abuses by, or involving, business enterprises*

Private actors are generally not directly bound by human rights because they are not considered full subjects of international law.⁴⁰ Efforts to hold private actors responsible thus need to relate to the state's horizontal obligation to protect human rights. Yet, the activities of private actors can have a significant impact on human rights, mainly if states do not have at their disposal sufficient legal frameworks to protect human rights. On the international level, the UN, ILO and OECD have adopted various non-binding instruments regarding 'Corporate Social Responsibility', such as the ILO Tripartite Declaration and the OECD Guidelines. The former UN Sub-Commission on the Promotion and Protection of Human Rights drafted the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' which extended human rights obligations to corporations. The document was not adopted because of strong opposition by states and the business community. It led, however, to the appointment of a Special Representative to the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises in July 2005. Since then, a new approach has been developed, based on a bottom-up process exploring attitudes of the business community to the issue. The approach starts out from the horizontal duty of states to protect human

38 United Nations Development Programme, Human Development Report 2006 'Beyond Scarcity: Power, Poverty and the Global Water Crisis' (2006), p. 87.

39 *Ibid.*; V. Roaf, A. Khalfan and Malcolm Langford, 'Monitoring implementation of the right to water: A framework for developing indicators' (2005) 14(1) *Global Issues Papers* 34.

40 See C. Breining-Kaufmann, 'The legal matrix of human rights and trade law: State obligations versus private rights and obligations', in T. Cottier, J. Pauwelyn and E. Bürgi (eds.), *Human Rights and International Trade* (Oxford University Press, 2005), p. 99.

rights from being violated by private actors. It defines a framework to be implemented by states which requires companies to respect human rights and calls for the development of effective remedy mechanisms. The next step will be to further develop this framework into a viable and effective regime for international business and human rights.⁴¹ This approach overcomes the conceptual deficit in general international law with regard to private actors by defining a clear framework for states on how to comply with their horizontal obligations under international human rights law. The suggested draft decision follows this avenue and applies it to potential conflicts of international trade law and human rights in the business context.

VI. . . . *Accepting the United Nations' human rights approach to trade, that 'seeks trade law and policy that take into account the rights of all individuals, in particular vulnerable individuals and groups' and 'requires a constant examination of the impact of trade liberalization on the enjoyment of human rights'*

The UN High Commissioner for Human Rights asks for policies which:

- (a) Set the promotion and protection of human rights among the objectives of trade liberalization;
- (b) Examine the effects of trade liberalization on individuals and seek trade law and policy that take into account the rights of all individuals, in particular vulnerable individuals and groups;
- (c) Emphasize the role of the State in the process of liberalization – not only as negotiators of trade law and setters of trade policy, but also as the primary duty bearer for the implementation of human rights;
- (d) Seek consistency between the progressive liberalization of trade and the progressive realization of human rights;
- (e) Require a constant examination of the impact of trade liberalization on the enjoyment of human rights;
- (f) Promote international cooperation for the realization of human rights and freedoms in the context of trade liberalization.⁴²

41 See for all available material www.business-humanrights.org/SpecialRepPortal/Home (visited 16 August 2009).

42 Report of the High Commissioner for Human Rights, *Liberalization of Trade in Services and Human Rights*, E/CN.4/Sub.2/2002/9; see also www2.ohchr.org/english/issues/globalization/trade/index.htm (visited 14 April 2009).

Against this background, policy evaluations are necessary to measure the impact of trade policies on human rights and mutually supportive synergies. Impact assessment methodologies are currently being developed by international organisations (UNHCHR and UNEP) as well as by WTO Members (EU) and academia,⁴³ with human rights impact assessment being mainly addressed within the UN framework.⁴⁴

VII. . . . *Noticing the Singapore Declaration's 'commitment to the observation of internationally recognized core labour standards' as well as the statement in the Declaration on Social Justice for a Fair Globalization of the International Labour Organization that the 'violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage'*

During the WTO Ministerial Conference held in Singapore in 1996, states renewed their commitment to internationally recognised labour standards.⁴⁵ The ILO was defined as the competent body for addressing and developing international labour standards.⁴⁶ In 1998, the International Labour Conference adopted the today widely accepted ILO Declaration on Fundamental Principles and Rights at Work that all members of the ILO are required to respect, promote and realise.⁴⁷ These fundamental rights at work comprise the prohibition of forced labour and child

43 M. Gehring, *Nachhaltigkeit durch Verfahren im Welthandelsrecht. Umwelt – und Nachhaltigkeitsprüfungen und die WTO* (Berlin, Duncker & Humblot, 2007); Communication from the Commission on Impact Assessment, 5.6.2002, COM(2002)276; Communication from the Commission, A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, 15.5.2001, COM(2001)264; C. George and C. H. Kirkpatrick, *Impact Assessment and Sustainable Development: European Practice and Experience* (Cheltenham, Edward Elgar, 2007); L. Turner, N. Nguyen and K. Bird, *Fighting Poverty, An Overview of Ex Ante Tools for Assessing the Impact of Trade Liberalisation on the Poor* (Overseas Development Institute, 2008); for UNEP methodology see www.unep.ch/etb/areas/IntTraRelPol.php (visited 14 April 2009).

44 S. Walker, 'Human rights impact assessments of trade-related policies', in M. W. Gehring and M.-C. Cordonier Segger (eds.), *Sustainable Development in World Trade Law* (The Hague, Kluwer, 2005), p. 227.

45 WTO, Singapore, Ministerial Declaration, WT/MIN(96)/DEC/W, 13 December 1996, para. 4.

46 *Ibid.*

47 Adopted by the International Labour Conference, 86th session, 18 June 1998, ILC, Record of Proceedings, Nos. 20 and 22 (86th Session, Geneva 1998); C. Kaufmann, *Globalisation and Labour Rights* (Oxford, Hart, 2007), pp. 67–77.

labour, freedom of association, the right to organise and bargain collectively, equal remuneration for men and women for work of equal value and non-discrimination in employment.

One of the most controversial issues in the trade and labour debate is the effect of labour standards on terms of trade. As early as 1919, the Preamble of the Constitution of the International Labour Organization (ILO) stated that 'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations, which desire to improve the conditions in their own countries'.⁴⁸ Likewise, the Havana Charter of 1948 mentioned that unfair labour conditions can create difficulties in international trade and provided for cooperation with the ILO.⁴⁹ Yet, when the World Trade Organization (WTO) was established in 1995, it did not provide for a formal linkage of trade and labour standards. The ILO Declaration on Fundamental Principles and Rights at Work of 1998 confirmed the approach of the WTO in Singapore holding that 'labour standards should not be used for protectionist purposes',⁵⁰ thus securing the competitive advantage of the developing countries. However, the Declaration did not address the reverse situation where low labour standards are used to lower production costs.

The recently adopted ILO Declaration on Social Justice for a Fair Globalization of June 2008 balanced this statement by holding that the:

violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage.⁵¹

This constitutes a fundamental shift in the trade and labour debate, putting labour standards on the same level as trade and even calling on other organisations to cooperate.⁵² In fact, with this statement, the ILO is going back to the Philadelphia Declaration of 1944 where it had emphasised the need for mainstreaming labour rights into the work of financial

48 International Labour Organization, Part XIII (Labour) of the Treaty of Versailles of 28 June 1919, Section I.

49 Art. 7 of the Havana Charter, Final Act and related Documents, UNCTAD, Interim Commission for the International Trade Organization, Havana, 1948, E/Conf.2/78.

50 Para. 5 of the ILO Declaration of Fundamental Principles and Rights at Work.

51 Para. I. A. (iv) of the ILO Declaration on Social Justice for a Fair Globalization, ILO, Provisional Record 13 A/B, International Labour Conference, 97th session (Geneva, International Labour Office, 2008).

52 See F. Humbert, *The Challenge of Child Labour in International Law* (Cambridge University Press, 2009).

and economic organisations.⁵³ Thus, a 'new' form of social clause may be back on the global agenda for the trade and labour debate, as is already the case at the regional and bilateral levels.⁵⁴ Accordingly, the new Declaration calls upon the ILO to assist its Members to promote the ILO's strategic objectives within the framework of bilateral or multilateral agreements.⁵⁵ In conclusion, the new ILO Declaration represents a building block in the trade and labour debate because it not only refers to the rationale of unfair competition for the trade and labour linkage but also highlights the potential for trade agreements to advance the objectives of the ILO.

By invoking the most recent ILO Declaration, the draft decision follows the approach chosen by the Singapore Declaration in reaffirming Members' commitments.

VIII. . . . Noting that carefully drafted trade incentive regimes may advance the cause of human rights

Carefully drafted social clauses in trade agreements such as the US and EU Generalized Systems of Preferences (GSPs) or the US–Cambodia Textile Agreement can advance the cause of human rights. Such clauses have contributed towards improving the implementation of labour standards and human rights in some countries.⁵⁶ Therefore, they might be explored as a model for multilateral agreements. Since the application of such social clauses has shown that their unilateral adoption and application carries the risk of being politically and economically arbitrary,⁵⁷ criteria

53 Adopted at the 26th General Conference of the ILO in Philadelphia on 10 May 1944 as Annex to the ILO Constitution, Art. II(d). See C. Kaufmann, *Globalisation and Labour Rights* (Oxford, Hart, 2007), pp. 50–52.

54 See for example the partnership agreement between the members of the African, Caribbean and Pacific Group of States, and the European Community, signed in Cotonou on 23 June 2000 – Protocols – Final Act – Declarations, OJ 2000 No. L 317/3; Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, available at: www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf (visited 14 April 2009).

55 Para. II. A. (iv) of the ILO Declaration on Social Justice for a Fair Globalization, ILO, Provisional Record 13 A/B, International Labour Conference, 97th session (Geneva, International Labour Office, 2008).

56 See F. Humbert, *The Challenge of Child Labour in International Law* (Cambridge University Press, 2009), chapter 4; F. Humbert, 'Do social clauses in generalized systems of preferences advance the cause of women?' (2008) NCCR Working Paper 2008/4.

57 See F. Humbert, *The Challenge of Child Labour in International Law* (Cambridge University Press, 2009), chapter 4.

for a multilateral framework for GSPs under the WTO agreements will be suggested below.⁵⁸

1. Lessons from the US GSP

Under GSPs, developed countries grant reduced or zero tariff rates to selected products originating in developing countries. Under the Trade Act of 1984, the US GSP was re-authorised and labour rights conditionality was introduced, requiring beneficiary countries to observe 'internationally recognized worker rights'. An applicant country is ineligible if it is not taking steps to implement a certain set of unilaterally determined labour rights such as the right to association and collective bargaining, the prohibition on the use of any form of forced or compulsory labour, a minimum age for employment of children, acceptable conditions of work with respect to wages, hours of work and occupational health and safety.⁵⁹ A country is also ineligible if it has not complied with its commitments to eliminate the worst forms of child labour.⁶⁰ Generally, it would be preferable to explicitly refer to the relevant ILO Conventions in order to provide a clear applicable standard.

Under the national interest clause, the President may however determine that the economic interests of the US preclude a country from being designated as a beneficiary.⁶¹ This opens the door for arbitrary application and non-transparent criteria. Nevertheless, the reporting, petition and review process of the US GSP has achieved good results for the labour rights situation in some countries.⁶² Still, the application of the social clause could be made more objective and effective through a review mechanism overseen by trade *and* human rights experts at the decision-making level, by introducing guidelines for the acceptance and rejection of petitions and by mainstreaming it with regard to the international level, e.g. through subjection to a special multilateral appeal mechanism.⁶³

58 See III, 3, c. 59 19 United States C. Sec. 2462 (b)(2)(G).

60 19 United States C. Sec. 2462 (b)(2)(H). 61 19 United States C. Sec. 2462(b)(2).

62 See for example F. Humbert, *The Challenge of Child Labour in International Law* (Cambridge University Press, 2009), chapter 4; F. Humbert, 'Do social clauses in generalized systems of preferences advance the cause of women?' (2008) NCCR Working Paper 2008/4.

63 While the WTO dispute settlement mechanism may already take on a complaint relating to the GSPs, there should be a special appeal mechanism consisting of trade and human rights experts and allowing for a timely and effective handling of disputes on GSPs. For a more thorough analysis, see *ibid*.

2. Lessons from the EU GSP including the case of Sri Lanka

The current EU GSP provides for general arrangements and, inter alia, a special incentive arrangement for sustainable development and good governance that refers to several human rights treaties.⁶⁴ Under the special incentive arrangements, additional incentives are granted to beneficiary countries if they have ratified and effectively implemented sixteen human rights conventions and at least seven conventions from a choice of conventions on the environment and governance principles.⁶⁵ Under its withdrawal procedure, the EU may withdraw the special incentive arrangement if the beneficiary country ceases to implement human rights or labour rights.⁶⁶

A Sri Lankan case study has shown that if the granting and withdrawal procedure is effectively implemented and cooperation with trade unions and civil society groups takes place, the EU GSP can be a useful tool for improving human rights performance, including the introduction of administrative measures such as equal wage rates for men and women or new guidelines for a broader application of trade union rights.⁶⁷ In particular, the EU should review the human rights situation before granting special preferences including in situ visits, should exert continued pressure on a non-complying country, introduce an effective complaints mechanism and closely cooperate with ILO and UN bodies as well as with trade unions and civil society.⁶⁸

IX. . . . that the World Trade Organization shall fully respect the international law of human rights and support their full enjoyment

Those responsible for WTO policy should be aware of potential negative impacts of WTO law on human rights in their daily practice. In this regard, sufficient policy space for Members to meet their human

64 Council Regulation (EC) No. 980/2005 of 27 June 2005 applying a scheme of generalized tariff preferences, OJ 2005 L 169/1, extended by Council Regulation (EC) No. 732/2008 of 22 July 2008 applying a scheme of generalized tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulation (EC) No. 557/97, (EC) No. 1933/2006 and Commission Regulations (EC) No. 1100/2006 and (EC) No 964/2007, OJ 2008 L 211/1.

65 Art. 9(1) lit. a to e of Council Regulation (EC) 980/2005.

66 Art. 16(2) of Council Regulation (EC) No. 980/2005.

67 F. Humbert, 'Do social clauses in generalized systems of preferences advance the cause of women?' (2008) NCCR Working Paper 2008/4, pp. 26–37.

68 *Ibid.*, pp. 36–7.

rights obligations⁶⁹ as well as technical assistance and flanking measures to support developing countries in complying with their human rights obligations are essential. Such a mainstreaming approach requires cooperation with competent human rights bodies.

X. . . . that the protection of human dignity shall be a guiding principle of the Organization

Human dignity as a guiding principle in resolving conflicts between human rights and international trade law requires a 'dimension of weight'⁷⁰ or 'importance'⁷¹ to be attributed to it, e.g. in a conflict between the prohibition of subsidies and assuring the right to food.

XI. . . . that a Multilateral Agreement on Trade and Human Rights is to be negotiated, providing appropriate instruments to foster the cause of mutually supportive regimes, institutional and legal coherence and the full enjoyment of all human rights

We came to the conclusion that a full agreement, annexed to the Marrakesh Agreement, and thus with a legal relevance equal to that of GATT, GATS or TRIPS, is preferable to other possible regulatory forms, such as a side-agreement, a political declaration, an authoritative interpretation (Article IX:2 Marrakesh Agreement), or a plurilateral agreement with phase-in provisions. As mentioned above, all WTO Members are bound to specific human rights. Furthermore, the objective of sustainable development requires a balance between human rights and trade. Establishing appropriate legal instruments to coordinate both regimes is thus not optional or a mere interpretative issue, but a genuine systemic task to be performed. Given that human rights are a horizontal issue affecting the whole body of WTO law and not a sub-category of international trade law or conflict rules, they need to be enshrined at the same regulatory level as the WTO Agreements.

69 C. Dommen, 'Human rights and trade: Two practical suggestions for promoting coordination and coherence', in T. Cottier, J. Pauwelyn and E. Bürgi (eds.), *Human Rights and International Trade* (Oxford University Press 2005), p. 199.

70 R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

71 See for a 'dimension of weight' regarding values of 'vital importance to the highest degree', Appellate Body Report, *EC – Asbestos*, paras. 169–172.

C. Fulfilling the task: elements of a multilateral agreement on trade and human rights

As an instrument of effective coordination, a multilateral agreement on trade and human rights has to provide procedures and mechanisms to develop criteria and principles which address the intersection of trade and human rights, not only with regard to dispute settlement but also policies and decision-making procedures.

I. Policy coordination

An effective balance between trade and human rights regimes requires an exploration of the potential positive and negative impacts of both fields on each other and a search for appropriate means to prevent and counter the negative effects. In line with the UNHCHR human rights approach to trade,⁷² this calls for systematic impact assessments scanning existing WTO law as well as future provisions on the agenda, including monitoring and follow-up. Accordingly, adequate institutional devices, mechanisms, procedures and criteria are needed, with inter-institutional cooperation between the WTO and human rights institutions being a central condition. Avenues to be pursued include mutual observer status and exchange of information, inter-institutional agreements,⁷³ memoranda of understanding and common committees.⁷⁴ A Committee on Trade and Human Rights could be mandated to establish and monitor policies and to create a cooperative link to other international bodies competent to deal with human rights questions, such as the UNHCHR, the ILO⁷⁵ the OECD, UNESCO, the World Bank or the FAO.

For more information on trade and human rights, to be 'fed' into impact assessment analysis and methodology, broadening the mandate of the Trade Policy Review Mechanism (TPRM), to address not only trade policy per se but also its impact on human rights, may be an avenue to pursue. Such a mandate would enable a multilateral assessment of the

72 See note 43 above.

73 See J. Neumann, *Die Koordination des WTO Rechts mit anderen völkerrechtlichen Ordnungen* (Berlin, Duncker & Humblot, 2002).

74 See for an overview V. Mosoti, 'Institutional cooperation and norms creation in international organizations', in T. Cottier, J. Pauwelyn and E. Bürgi (eds.), *Human Rights and International Trade* (Oxford University Press, 2005).

75 See for the current state of WTO/ILO cooperation, www.wto.org/english/thewto_e/coher_e/wto_ilo_e.htm (visited 14 April 2009).

positive and negative effects that WTO norms may have on human rights and policies.

The suggested assessment would correspond better to the WTO's sustainable development objective than the existing mechanism does.⁷⁶ It could build on current TPRM transparency obligations which already comprise Members' 'wider economic and developmental needs, their policies and objectives'.⁷⁷

II. Dispute settlement

A multilateral framework on trade and human rights should clarify WTO law interpretation with regard to human rights and provide for more coherence and predictability. Existing rules of treaty interpretation (such as the VCLT)⁷⁸ require WTO dispute settlement bodies to consider human rights obligations and to apply WTO law in conformity with existing human rights obligations.⁷⁹ This implies that WTO bodies should exercise judicial restraint if human rights claims are based on measures that are necessary to protect human rights and are thus applied on a good faith basis and not in an arbitrary or discriminatory manner.⁸⁰ WTO bodies have, in the light of Article 3.2 DSU and Article 31(3)(c) VCLT, recognised that the WTO is embedded in the international legal system and that provisions outside WTO law should clarify rights and obligations under the WTO covered agreements.⁸¹ There is still dispute, however, over the extent to which 'relevant rules of international law' should be 'applicable

76 R. Howse and R. G. Teitel, 'Beyond the divide. The Covenant on Economic, Social and Cultural Rights and the World Trade Organization' (2007) 30 *Dialogue on Globalization* 18, available at: <http://library.fes.de/pdf-files/iez/global/04572.pdf>. (visited 14 April 2009).

77 See TPRM Agreement, Annex 3, Trade Policy Review Mechanism, A. Objectives (ii).

78 Preamble, para. 6; Art. 31.

79 With regard to human rights obligations of international organisations, see the decision by the European Court of Human Rights in *Behrami and Behrami v. France and Saramaty v. France, Germany and Norway* (dec.) [GC], Nos. 71412/01 and 78166/01, 2 May 2007.

80 See in terms of a human rights caveat for the national level, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, cases C-402/05P and C-415/05P, [2008] ECR I-(nyr); K. Ziegler, 'Strengthening the rule of law, but fragmenting international law: The Kadi decision of the ECJ from the perspective of human rights' (2009) 9 *Human Rights Law Review* 288–305.

81 Appellate Body Report, *US – Gasoline*, p. 17; Appellate Body Report, *US – Shrimp*, para. 130; Appellate Body, *EC – Asbestos*, para. 172; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003), pp. 443–472.

in relation between the parties'.⁸² Here, three interpretations are possible: first, only binding rules applicable between *all* member parties are to be considered;⁸³ second, only binding rules applicable between the *parties to the dispute* are to be taken into account;⁸⁴ and third, *all relevant rules* 'in relation between the parties' are to be applied, regardless of their binding effects⁸⁵ – or more restricted, if at least one party to the dispute is bound.⁸⁶ In 2003, the International Court of Justice convincingly argued for a broader interpretation.⁸⁷

The narrow interpretations could lead to a de facto priority of WTO provisions and thereby hinder coherence and consistency with norms in other areas of international law. Based on the principles of good faith and *pacta sunt servanda*, states are simultaneously and equally bound by their international law obligations. Except for *ius cogens* and obligations derived from the UN Charter, there is no priority of any specific body of international law.⁸⁸ As the Appellate Body stated, the WTO is not a self-contained regime, therefore its provisions are not to be read in 'clinical isolation' from public international law.⁸⁹ The WTO system is forming part of an international multilayered system of governance,⁹⁰

82 Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission (Koskenniemi Report), A/CN.4/L.682 (2006), para. 37; C. McLachlan, 'The principle of systemic integration and Article 31 (3) (c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 279–319; J. Pauwelyn, 'Bridging fragmentation and unity: International law as a universe of inter-connected islands' (2004) 25 *Michigan Journal of International Law* 913.

83 Panel Report, *EC – Biotech*, para. 7.68.

84 J. Pauwelyn, 'Bridging fragmentation and unity: International law as a universe of inter-connected islands' (2004) 25 *Michigan Journal of International Law* 910; J. Pauwelyn, 'Human rights in WTO dispute settlement', in T. Cottier, J. Pauwelyn and E. B r gi (eds.), *Human Rights and International Trade* (Oxford University Press, 2005), p. 216.

85 R. Howse and R. G. Teitel, 'Beyond the divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization' (2007) 30 *Dialogue on Globalization* 28–29, p. 39, available at: <http://library.fes.de/pdf-files/iez/global/04572.pdf>. (visited 14 April 2009).

86 B. McGrady, 'Fragmentation of international law or "systemic integration" of treaty regimes: EC-Biotech products and the proper interpretation of Article 31 (3) (c) of the Vienna Convention on the Law of Treaties' (2008) 42 *Journal of World Trade* 594.

87 International Court of Justice Case, *Oil Platforms (Islamic Republic of Iran v. United States of America)* ICJ Reports 2003, p. 161.

88 European Court of Human Rights *Matthews v. the United Kingdom*, case No. 24833/94, § 28, ECHR 1999-I.

89 Appellate Body Report, *US – Gasoline*, p. 17.

90 T. Cottier, 'Legitimacy of the WTO law' (2008) NCCR Working Paper 2008/19, 8.

which should be shaped in such a way as to allocate competencies appropriately and to coordinate 'inter-connected islands' of law.⁹¹ With regard to coordinating overlapping regimes, legal standards of interpretation and conflict resolution, providing guidelines for weighing and balancing rights and obligations (e.g. the 'importance' of values, or good faith standards⁹²), could clarify legitimate rights and obligations within the broader context of international law. Developed systematically, in collaboration between relevant institutions, such standards could enhance overall legitimacy of WTO law and foster coherence in international law. Although real conflicting cases regarding human rights may be rare,⁹³ it is a matter of time until the WTO bodies are confronted with delicate challenges to be resolved within the existing framework of WTO law. The WTO waiver for the 'Kimberley Process' on the control of conflict diamonds and the WTO dispute settlement rulings on conditional trade preferences for developing countries point in this direction.⁹⁴

The approach we propose here is procedural in nature, focusing on cooperation between international standard-setting bodies and judicial bodies, seeking competencies to provide expertise and establishing decision-making mechanisms to find viable solutions.⁹⁵ Such an approach would, for instance, allow WTO bodies to be involved in cases with political impact. Article 3(9) DSU and Article IX:2 WTO Agreement already foresee recourse to the Ministerial Conference and the Council to issue binding interpretations of WTO law. Yet, so far this mechanism has never

91 For the model of multilayered governance see the Introduction to this book; J. Pauwelyn, 'Bridging fragmentation and unity: International law as a universe of inter-connected islands' (2004) 25 *Michigan Journal of International Law* 903–916.

92 Appellate Body Report, *EC – Asbestos*, para. 172; Appellate Body Report, *US – Shrimp*, paras. 158 *et seq.*

93 See G. Marceau, 'WTO dispute settlement and human rights' (2002) 13 *European Journal of International Law* 758.

94 K. Nadakavukaren Schefer, 'Stopping trade in conflict diamonds: Exploring the trade and human rights interface with the WTO waiver for the Kimberley Process', in T. Cottier, J. Pauwelyn and E. Bürgi (eds.), *Human Rights and International Trade* (Oxford University Press, 2005), p. 391.

95 See in this respect, Report (Sutherland Report) of the Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (WTO, 2004). The Report does not tackle coordinative challenges and effective coordination with other regimes, but concentrates on 'old' WTO issues not facing further coordinative challenges and conflicts; see for critique Joost Pauwelyn, 'The Sutherland Report: A missed opportunity for genuine debate on trade, globalization and reforming the WTO' (2005) 8 *Journal of International Economic Law* 329.

been applied. Making use of this mechanism, WTO Members could clarify the meaning of WTO norms with regard to human rights in given cases. The instrument could be further developed, e.g. by establishing a quorum or procedures to allow for temporary violation, suspension or direct amendment of WTO provisions in the case of conflicts with human rights obligations. Other procedural instruments include systematic cooperation with international legal bodies in WTO arbitration, e.g. the obligation to apply, or to actively take into account, the opinion of UN treaty bodies or the ILO. In this context, hierarchy, or 'dimensions of weight' in international law, as well as criteria to resolve conflicts of norms could be explored on a more legitimate basis, e.g. by inter-institutional cooperation. Another instrument could be to establish a burden of proof favouring human rights, similar to cases under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) where the Appellate Body placed the burden of proof on the applicant,⁹⁶ or expert commissions in specific dispute settlement fields, as provided for in paragraph 4 of the Annex to the GATS on Financial Services, or improve civil society participation through greater transparency in decision-making, e.g. by granting public access to WTO Committees under an appropriate regime (Article V:2 Marrakesh Agreement), thus securing the functioning and effectiveness of the political bodies.

D. Specific annex agreements – some examples

In order to foster mutual supportiveness of human rights and trade law in specific fields, the multilateral framework should encourage the negotiation of specific agreements. Such agreements can take the form of an annex to a multilateral agreement on trade and human rights or to other WTO agreements. Our research included the development of rules for specific areas of potential conflicts between trade law and human rights.

I. Trade law and the right to food

Increased integration of international markets has raised concerns that openness to agricultural trade may jeopardise food security in developing

⁹⁶ Appellate Body Report, *EC – Hormones*, para. 97. G. Marceau and J. P. Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade. A map of the World Trade Organization law of domestic regulation of goods' (2002) 36 *Journal of World Trade* 831.

countries.⁹⁷ However, empirical evidence does not confirm that engaging in (international) agricultural trade is necessarily associated with high levels of undernourishment.⁹⁸ The impact of agricultural trade liberalisation on the right to food is mediated by many factors such as domestic policy reform that enhances positive effects of trade and cushions negative impacts.

From a right to food perspective, it is problematic that empirical studies typically refer to aggregates and say little about the distributional effects among and within countries.⁹⁹ Even if trade reform is likely to reduce poverty in the long run, economic theory recognises that some of the poor may be worse off.¹⁰⁰ Human Rights Impact Assessments (HRIAs) of trade-related rules and policies that are being developed as part of the doctoral research conducted in our project constitute an instrument to ensure coherence between human rights and international trade law obligations by identifying those complementary measures that may be required by human rights law to address adverse consequences of international trade.

Human rights law provides a conceptual framework for analysing trade rules and undertaking impact assessments, the latter implying that they should be public and participatory and focus on disadvantaged and vulnerable groups as well as gender effects of trade rules. It is important from both a legal and a political point of view that Human Rights Impact Assessments do not mean or imply conditionalities, monitoring or measuring human rights performance of states in any way that they have not agreed to. In particular, HRIAs are aimed to:

- help people identify and assess their rights;
- understand how trade reform can affect the enjoyment of those rights;
- identify ways in which governments can improve trade policies to fulfil human rights obligations; and

97 See B. Karapinar and C. Häberli (eds.), *Food Crises and the WTO* (Cambridge University Press, 2010).

98 Food and Agricultural Organization of the United Nations, 'The state of food and agriculture 2005: Agricultural trade and poverty – can trade work for the poor?' (2005) 36 *FAO Agriculture Series* 82–84.

99 C. Kaufmann and S. Heri, 'Liberalizing trade in agriculture and food security: Mission impossible?' (2008) 40 *Vanderbilt Journal of Transnational Law* 1041–1042.

100 S. Matusz and D. Tarr, 'Adjusting to trade policy reform', in A. O. Krueger (ed.), *Economic Policy Reform: The Second Stage* (University of Chicago Press, 1999), p. 389.

- identify ways in which governments can cooperate with the international community to fulfil human rights obligations.¹⁰¹

**BOX 8.2 POLICY ADVICE ON TRADE LIBERALISATION
AND THE RIGHT TO FOOD**

Draft guiding principles on Trade and the Right to Food

- With regard to the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Process on Least-Developed and Net Food-Importing Developing Countries¹⁰² further efforts must be undertaken to operationalise the response mechanisms listed in the Decision: (1) food aid, (2) short-term financing of normal levels of commercial imports, (3) favourable terms for agricultural export credits, and (4) financial assistance to improve agricultural productivity and infrastructure. A Ministerial commitment in the Doha Final Act to update and implement the Marrakesh Decision would be a first step in this regard.
- Efforts to reach a compromise between policy space and market access on Special Products and on the Special Safeguard Mechanism should be strengthened. The Agreement on Agriculture's preamble stipulates that 'commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security [...]'. The draft modalities' illustrative list of indicators for the designation of special products currently being discussed points in this direction.¹⁰³
- In line with the long-term objective in the preamble of the WTO Agreement on Agriculture 'to establish a fair and market-oriented agricultural trading system', important issues such as biofuels and disciplines for export restrictions should be addressed in future negotiations.
- Recalling the preamble paragraph of the Marrakesh Agreement that 'there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development', more efforts in the agricultural field are necessary. The Enhanced Integrated Framework should increasingly be used to build productive agricultural sectors. The evaluation criteria for the success of Aid for Trade should not only be growth in

101 S. Walker, 'Human rights impact assessments of trade-related policies', in M. W. Gehring and M.-C. Cordonier Segger (eds.), *Sustainable Development in World Trade Law* (The Hague, Kluwer, 2005), p. 227.

102 15 April 1994.

103 Draft Modalities for Agriculture, Doc. TN/AG/W/4/Rev.4 (6 December 2008), paras. 129–131, Annex F.

trade volumes but the impact of Aid for Trade on poverty reduction, the Human Development Index, and its contribution to the Millennium Development Goals.

- A feasibility study on whether a violation or a threat thereof by a WTO Member to respect, protect, and fulfil the right to food could serve as a criterion for different forms of special and differential treatment shall be undertaken. Causality involving a genuine and substantial relationship of cause and effect between the violation of the right to adequate food or the threat thereof, and the trade rule for which special and differential treatment is sought will be a necessary element. Whether there is a violation by a WTO Member of their obligation to respect, protect and fulfil the right to food will be determined by the Committee on Economic, Social and Cultural Rights. The WTO Secretariat will cooperate in this endeavour with the Office of the High Commissioner for Human Rights, the UN Special Rapporteur on the Right to Adequate Food and the Advisory Committee of the Human Rights Council.
- Following the missions to the WTO of the UN Special Rapporteur on the right to health in 2004¹⁰⁴ and the UN Special Rapporteur on the right to adequate food in 2008, a standing invitation of the WTO Membership to Missions of UN Special Rapporteurs should be considered to enable such exchanges to become more common.
- Members should be encouraged to report on food security-related trade policies in their trade policy review by e.g. structuring the food security-related trade policy review along the trade-relevant guidelines of the FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security. Usage of the Voluntary Guidelines in the TPRM shall not be construed as recognising any change in the current state of conventional or customary international law regarding rights related to food.
- Aid for Trade and Food Aid Commitments shall become binding by inclusion in Members' schedules.

II. Trade in services and human rights

A specific Annex to the GATS on trade-related aspects of human rights and essential services could underline the need for human rights impact assessment in the services sector. WTO rules can only provide regulatory space for WTO Members to protect human rights; concrete regulation or flanking measures for protecting affected people remain the responsibility of the individual Member. Regarding the WTO's specific commitment to

104 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mission to the World Trade Organization, UN Doc. E/CN.4/2004/49/Add. 1 (1 March 2004), para. 2.

developing countries, the WTO could assist as a consultative body in the technical design of flanking measures or cooperation with development institutions (World Bank, foreign technical assistance) in the countries concerned. Institutionally, establishing a specialised Coordinating Committee in the WTO could facilitate cooperation.

III. *Corruption, trade and human rights*

The rationale for a specific Agreement or Protocol on Corruption annexed to a multilateral agreement on trade and human rights begins with the significance of corruption in individuals' enjoyment of their fundamental rights. It is underlined by the impacts of corruption on trade liberalisation that distort the human rights of traders and citizens.

1. The relationship between corruption and human rights

The links between corruption and human rights are the focus of significant research efforts.¹⁰⁵ While looking at corruption's impacts on specific human rights can illuminate the severe violations of human rights protection, analysis of how corruption affects the willingness or ability of a state to respect, protect, and promote such rights is more apparent by an examination of three aspects of human rights obligations on the state: duties of non-interference, substantive duties to act, and procedural duties of the administrative and court systems. To these three aspects a discussion of corruption's effects on the right to democratic participation as a right that is especially put at risk by corrupt state structures can be added. In the area of duties of non-interference, corruption can have the result of spurring violations in order to benefit the official who authorises the interference. Here, actions to block political opposition, whether through restraints on speech, press, or gatherings, can arise from corrupt political systems or be maintained by power-holders who keep their control through illicit transactions.

Where substantive duties to act are necessary to comply with a state's human rights obligations, such as in the provision of social and economic goods, corruption's impacts are even clearer. Losses of state moneys through embezzlement or nepotism-driven overpayment on

105 E.g. J. Bacio-Terracino, *Corruption as a Violation of Human Rights* (2008) <http://ssrn.com/abstract=1107918> (visited 14 April 2009); B. Rajagopal, 'Corruption, legitimacy and human rights: The dialectic of the relationship' (1999) 14 *Connecticut Journal of International Law* 495.

contracts or corruption-induced laxness in enforcing quality controls reduces the state's ability to provide citizens with access to health, education, and food, and can endanger the lives of labourers and consumers of state-built infrastructure. Procedure-based human rights can be negated by corruption as principles of non-discrimination and fair treatment are ignored in favour of self-interest. Judicial corruption, too, puts individual's rights to be presumed innocent, to be judged in accordance with the law, and subject to proportionate sanctions in competition with the court's personal interests.

Despite the severity of corruption's infringements of the above-mentioned human rights, the systemic nullification of rights to democratic participation necessarily arising from any significant level of corruption in a state may be the most damaging effect of corruption in the long term.¹⁰⁶ Extreme corruption, such as existed in states like Indonesia under the leadership of Suharto, can effectively blend the personal interests of the leader with the public interest. Even moderate levels of corruption, however, damage democracies. When state officials, whether bureaucrats, legislators, or leaders, act in their own personal interest, rather than that of the state and its population, the electorate is effectively denied its right to participate in the governance.

2. Corruption's effects on trade

Evidence offered by empirical studies shows how trade is affected by (and affects) levels and types of corruption.¹⁰⁷ The review and analysis of such studies for their human rights implications makes clear that – using the framework set out above – those general effects of corruption on human rights have specific parallels within the trade administration, in particular where the state has procedural duties (in the administrative and court

106 The right to participate in public affairs, voting rights and the right of equal access to public service is anchored in Article 25 of the International Covenant on Economic, Social and Cultural Rights, see General Comment No. 25, available at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument) (visited 5 August 2009).

107 See, e.g., S. Bandyopadhyay and S. Roy, 'Corruption and trade protection: Evidence from panel data' (2007) Fed. Res. Bank of St. Louis Working Paper 022A (available at: <http://research.stlouisfed.org/wp/2007/2007-022.pdf>); R. Damania, P. G. Fredriksson, J. A. List, 'Trade liberalization, corruption, and environmental policy formation: Theory and evidence' (2003) 46 *Journal of Environmental Economics & Management* 490–512; H. Sung, 'Between demand and supply: Bribery in international trade' (2006) 44 *Crime, Law & Social Change* 111.

systems) and where trade liberalisation requires the approval of the citizenry to be legitimate.¹⁰⁸ In even the simplest case of corruption in the trading system, for instance bribery of an official for an import licence, the corruption itself can violate the trader's right to fair and non-arbitrary administrative procedures. Other cases of corruption, where government procurement contracts are granted to relatives of an official despite a lower quality or higher cost end-product than other bidders could have delivered, for example, may have even more serious human rights implications – such as violating citizens' rights to health if the contract was to supply medicines to the national healthcare system. And, as stated above, corruption's frequent violation of the right to democratic participation can have clear impacts on the legitimacy of trade liberalisation. Where legislated openings of markets are passed due to illicit influences on law-makers by foreign industry, the citizens are denied their voice in government. The liberalisations are therefore equally illegitimate – procedurally, even if not always substantively.

3. Corruption's effects on the trade and human rights relationship

Finally, a WTO text on corruption, trade and human rights is necessitated by the fact that corruption has an influence on whether or how trade liberalisation could be affecting human rights. That is, corruption impacts areas where there are 'trade and human rights' problems, at times making the liberalisation of such areas more threatening to human rights (such as when corrupted legislators pass laws that allow highly efficient foreign competitors to enter a market previously dominated by small-scale producers who lived at the margins of existence and who now face serious violations of their economic rights to work, shelter, food and health; or when the access of foreign service providers of education to a market results in a factual division of the school system into public schools and private schools, with the poor forced to attend increasingly under-resourced institutions while the wealthy attend private schools) and at other times making the non-liberalisation of certain areas threatening to human rights (if corrupt officials with an interest in maintaining a monopoly market refuse to permit competition in a food staple, for example, poor urban dwellers may be denied access to sufficient nutrition). It is even possible that corruption has prevented some negative

108 See K. Nadakavukaren Schefer, 'Corruption and human rights' (2009) 43 *Journal of World Trade* 737–770.

changes to the level of particular human rights enjoyed by some while nevertheless failing to support an overall system of human rights protection (when, for instance, a particular export industry is sheltered from foreign competition due to the monetary benefits from such protection going to the law-maker, the employees are ensured further work, but suffer in their rights to an answerable government).

**BOX 8.3 DRAFT AGREEMENT ON CORRUPTION, TRADE, AND
HUMAN RIGHTS**

Members,

- *Acknowledging* the impact of corruption on all governments and at every level of administration;
- *Recognising* the multiple opportunities for corruption in trade regulation provided by the high volume of transactions and the economic value of these transactions;
- *Stressing* the need to continually strive to develop new methods to counter corruption;
- *Deploring* the massive misallocation of public resources (financial, personnel) that corruption causes;
- *Concerned about* the grave consequences of corruption on the willingness and ability of a state to fulfil its human rights obligation, and in particular about the inevitable demise of effective rights of democratic participation that accompanies corruption;
- *Determined* to address corruption in trade administrations as a human rights problem,

Hereby agree as follows:

Article 1 – Coverage

This Agreement applies to Members' efforts to address corruption as it relates to trade and human rights;

Article 2 – Definition of Corruption

For purposes of this Agreement, corruption shall include any acts or omissions by a public official of a Member to give an illegitimate benefit or to refrain from issuing a punishment or disadvantage to another individual in exchange for something of value to that official.

Article 3 – Minimum Standard of Corruption-Control Efforts

1. Members shall comply with the United Nations Convention against Corruption.
2. A Member may require higher standards of corruption control, should it consider it feasible to do so.

Article 4 – Transparency

1. Members shall ensure the transparency of their trade administrative procedures, in particular by:
 - a) ensuring that decision-making is reasoned and made available to affected traders, and
 - b) providing judicial review of administrative decisions by independent judges.
2. Members shall make detailed public accounts open and available to interested persons.

Article 5 – Non-Discrimination

Members shall perform their corruption control activities within a framework of non-discrimination as set forth by Articles I and III GATT 1994 and Articles 3 and 4 TRIPS.

Article 6 – Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement.
2. Members shall refrain from using corruption charges as an instrument of negotiating pressure.

Article 7 – Developing and Least-Developed Country Members

1. Members shall accept a commitment to extend financial support to developing and least-developed Members in their efforts to reduce public corruption.
2. Members shall accept a commitment to extend technical support to developing and least-developed Members in their efforts to reduce public corruption.

Article 8 – Committee on Corruption

1. A Committee on Corruption will be established that will act as a point of enquiry as well as a provider of technical assistance and international cooperation with other intergovernmental and non-governmental organisations.
2. Committee members will meet not less than twice a year and otherwise at the request of any Member.
3. The Committee's function will include the furthering of research on the topic of this Agreement.

IV. Trade incentive regimes for human rights

Carefully drafted social clauses in trade incentive regimes such as GSPs may not only foster human rights but also contribute to achieving coherence between human rights and international trade law.

1. The status quo of GSPs under WTO law

Under the status quo, GSPs are compatible with WTO law if they meet the criteria of the Enabling Clause.¹⁰⁹ According to the Appellate Body, schemes that provide for objective criteria and are available to all similarly situated developing countries with the same developing needs meet these conditions.¹¹⁰ Examples of such objective criteria include international human rights protected under UN and ILO Conventions as mentioned in the EU GSP. By contrast, interest clauses such as those used by the US are unlikely to meet the standards established by the Appellate Body.¹¹¹ Thus, future social clauses should be framed along the lines of the EU GSP taking into account the recommendations made above.

2. Developing criteria for GSPs under a multilateral framework

Criteria for future social clauses in trade incentives should be incorporated into the WTO Agreement building upon the criteria of the Enabling Clause. From a substantial point of view they should be drafted along the following guiding principles:

- They should provide for cooperation with UN and ILO bodies.
- The relevant standards should be the ILO and UN human rights conventions.
- The procedures for granting and withdrawing tariff preferences should include human rights assessments, in situ visits by trade and human rights experts, ideally in cooperation with civil society and trade unions, and should provide detailed application guidelines ensuring effective monitoring and should set out the consequences in case of non-compliance with human rights.¹¹²

The decisions on granting and withdrawing should be made subject to an effective review mechanism. Such a review mechanism should in

109 GATT Contracting Parties, Decision of 28 November 1979, 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries', BISD 26/203 (1980).

110 Cf. Appellate Body Report, *EC – Tariff Preferences*.

111 F. Humbert, 'Do social clauses in generalized systems of preferences advance the cause of women?' (2008) NCCR Working Paper 2008/4, 45.

112 See also the Draft Proposal for a 2008 ILA Resolution on 'International trade law and human rights' in International Law Association, Rio Conference (2008), International Trade Law, pp. 15–17, which submits that respect for human rights increases civil society support for the WTO.

turn be subjected to a special appeal mechanism under the WTO, open for WTO Members.

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